NO. 47941-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION TWO

JAMES KELLY,

Appellant,

v.

CAVALRY PORTFOLIO SERVICES, LLC,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant James Kelly's Complaint asserted a legally untenable Consumer Protection Act (the "CPA") claim that was properly dismissed.

In January 2012, Respondent Cavalry Portfolio Services, LLC ("Cavalry") sent a letter to Kelly. The letter notified Kelly that his credit card company had sold his defaulted debt and that Cavalry was seeking to collect on that debt. The letter was accurate in all material respects. It accurately stated the particulars of Kelly's defaulted debt and it invited Kelly to advise Cavalry if he disputed the validity of the debt. The letter did, however, mistakenly identify which Cavalry affiliate had purchased Kelly's debt.

It is undisputed that Kelly never paid his debt. He defaulted on the debt owed to his credit card company and he never made any payment on the debt to Cavalry or otherwise. Nevertheless, Kelly alleged a CPA claim against Cavalry, asserting that the January 2012 notice letter was "unfair and deceptive."

The foundational problem with Kelly's CPA claim is that it is an effort to fit a square peg in a round hole. The conduct about which Kelly complains—the sending of a single notice letter—occurred in the course of Cavalry's conduct of a highly-regulated business. The Washington Collection Agency Act (the "CAA") and the Federal Debt Collection

Practices Act (the "FDCPA") both address and comprehensively regulate collection activities. But Kelly did not plead a claim under either of these statutes—an implicit acknowledgment that there was no collection-related misconduct by Cavalry. Regardless, and what matters for purposes of this appeal, an immaterial mistake cannot be unfair or deceptive and does not violate the CPA.

At oral argument on Cavalry's motion, Kelly's counsel acknowledged that "where we are today is was this act unfair or deceptive?" The trial court then dismissed Kelly's claim pursuant to CR 12(c), holding as a matter of law that Cavalry's conduct was not "a deceptive or unfair act."

All of the relevant facts are undisputed and the error in question is immaterial. The trial court's ruling is correct under Washington law and it should be affirmed.

II. RESTATEMENT OF FACTS

A. APPELLANT'S DEBT AND DEFAULT

Kelly obtained a credit card from Bank of America / FIA Card Services. (CP 3, ¶ 4.1.) Kelly defaulted on his debt repayment obligations to Bank of America / FIA Card Services. (Id., ¶ 4.3.) Kelly's defaulted debt was then sold to Cavalry SPV I, LLC, which is not a party to this action. (Id., ¶ 4.5; see also CP 31:9 – 34:23.)

B. CAVALRY'S NOTICE LETTER

On January 9, 2012, Cavalry, which services and collects debt purchased by Cavalry SPV I, LLC, sent Kelly a letter regarding his defaulted debt. (CP 3, ¶¶ 4.6, 4.7; CP 25:24-25; CP 186.)[1] The letter informed Kelly that his account had been sold by FIA Card Services and referred to Cavalry for collection. (CP 186.)

The letter notice letter accurately identified (i) the original creditor, *i.e.*, Bank of America / FIA Card Services; (ii) the original account number; (iii) the principal and interest due; and (iv) the date of Kelly's last payment. (Id.) The letter contained an error in that it identified Cavalry Investments, LLC as the purchaser of Kelly's debt. (CP 35-37.) The error was a mistake by a third-party vendor that prepared the letter; a different Cavalry affiliate, Cavalry SPV I, LLC, was the purchaser. (CP 36-37.)

The letter also advised Kelly that:

> (a) "Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid;" and
>
> (b) "If you notify this office in writing within 30 days from receiving this notice that you dispute the validity of this debt or

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[1] Kelly's Complaint referred to and quoted from the January 9, 2012 letter, but the letter was not attached to the Complaint. Cavalry submitted the letter to the trial court in support of its motion for judgment on the pleadings. (CP 115, ¶ 2; CP 186.) Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may be considered in ruling on a Rule 12 motion. Jackson v. Quality Loan Service Corp., 186 Wn.App. 838, 844, 347 P.3d 487 (2015) (citations omitted); see also Rodriquez v. Loudeye Corp., 144 Wn.App. 709, 726, 189 P.3d 168 (2008).

any portion thereof, this office will obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification."

(CP 186.)

C. KELLY'S COMPLAINT

Kelly's Complaint asserted a single cause of action under the Consumer Protection Act. (CP 9-12.) With respect to Cavalry's notice letter, Kelly alleged that it was "unfair and deceptive."[2] (CP 9-11.)

The Complaint does *not* allege that Cavalry's notice letter misrepresented any of the material information set forth regarding his debt.[3] And Kelly's Complaint does *not* allege that he disputed the defaulted debt set forth in Cavalry's notice letter or that he otherwise contacted Cavalry. Finally, the Complaint does *not* allege that the notice

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[2] The vast bulk of the allegations of Kelly's Complaint concern a prior lawsuit to which Cavalry was *not* a party: Cavalry SPV I, LLC v. Kelly, Clark County Superior Court, No. 13-2-02609-4. (See generally CP 1-12; see also CP 96 at 10-11, CP 98:10 – CP 99:1.) As the trial court noted at oral argument, those collateral allegations have no bearing on the CPA claim against Cavalry; the pertinent legal issue is whether Cavalry engaged in an unfair or deceptive act under the CPA. (RP 4:11-22.)

[3] Kelly does not allege a *per se* unfair trade practice and this absence is revealing. As noted above, the CAA broadly regulates the conduct of persons engaged in the collection of debt. RCW 19.16, *et seq*. Under the CAA, the *manner* in which a collection licensee communicates with a debtor and the *substantive content* of such communications are both highly regulated. RCW 19.16.25; RCW 19.16.250. The plain purpose is to protect debtors from inappropriate conduct and to ensure that debtors are provided accurate information regarding their debt obligations. Kelly does not allege that Cavalry's January 19, 2012 letter violated any of the "prohibited practices" set forth at RCW 19.16.250(1)-(25). Kelly does not allege that Cavalry engaged in any harassing conduct—nor does he allege that Cavalry's notice letter misrepresented or failed to provide accurate and required information about his debt obligation. The FDCPA, 15 U.S.C. § 1692 *et seq.*, is the federal analog to the CAA. It also states extensive guidelines and prohibitions for debt collectors. Kelly does not assert any claim against Cavalry under the FDCPA.

letter caused Kelly to make a debt payment for which he was not obligated or to pay the wrong party.

D. CAVALRY'S MOTION FOR JUDGMENT

After answering the Complaint, Cavalry filed a motion for judgment on the pleadings under CR 12(c). (CP 90-112; CP 115-186.) Cavalry argued that Kelly's CPA claim should be dismissed for any or all of the following reasons: (i) there is no "unfair or deceptive act or practice," (ii) the public interest is not implicated, (iii) Kelly has not been damaged in his business or property by Cavalry, and (iv) there is no causal link between Kelly's alleged damages and any act or omission of Cavalry. (CP 96:21-24; CP 101-110.)

At oral argument on Cavalry's motion, the trial court stated that "it comes down to whether or not an unfair or deceptive act was perpetrated by [Cavalry], the servicing manager of an account owned by [SPV]." (RP 4:18-22.) Cavalry's counsel argued that "[t]he critical issue is … whether or not that notice letter constitutes an unfair or deceptive act, and why this is appropriate for resolution here on this motion is that issue is a question of law[.]" (RP 5:17-21.) Kelly's counsel likewise conceded that "I think where we are today is was this act unfair or deceptive?" (RP 17:7-8.)

The court then granted Cavalry's motion for judgment as follows:

> I am going to grant the motion as a matter of law an unintentional and bonafide error, and does not result, in this case,

> in a deceptive or unfair act. I just cannot find any basis to support a claim against [Cavalry] based on a letter that they sent January 9, 2012, when all – all in this letter is accurate and correct except for the error in listing that it [Kelly's debt] was purchased by Cavalry Investments, LLC when, in fact, it was purchased by Cavalry SPV1, LLC. Not a real significant difference in my mind to the party who – Mr. Kelly, and so I'll grant your motion.

(RP 20:7-19; see also CP 415-16.)

III. ARGUMENT

A. STANDARD OF REVIEW

A dismissal under CR 12(c) is reviewed de novo. P.E. Systems, LLC v. CPI Corp., 176 Wn.2d 198, 203, 289 P.3d 638 (2012) (citation omitted).

Washington courts treat a CR 12(c) motion for judgment on the pleadings identically to a CR 12(b)(6) motion to dismiss for failure to state a claim. P.E. Systems, 176 Wn.2d at 203 (citation omitted). CR 12(b)(6) provides for dismissal of a complaint if it fails to state a claim upon which relief can be granted. State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm., 135 Wn.2d 618, 623, 957 P.2d 691 (1998).

Dismissal is warranted if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery. Tenore v. AT & T Wireless Servs., 136 Wn.2d 322, 330, 962 P.2d 104 (1998), cert. denied, 525 U.S. 1171, 119 S.Ct. 1096, 143 L.Ed.2d

95 (1999). All facts alleged in a plaintiff's complaint are presumed true.[4] Id., 136 Wn.2d at 330. But the court is not required to accept the complaint's legal conclusions as true. Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).

Where the relevant facts are undisputed, the disputed issue is legal in nature and the applicable law is contrary to the plaintiff's claim, the court can and should grant a CR 12(c) motion. See, e.g., Fedway Marketplace West, LLC v. State, 183 Wn.App. 860, 336 P.3d 615 (2014) (affirming CR 12(c) dismissal); Ent v. Wash. State Criminal Justice Training Com'n, 174 Wn.App. 615, 301 P.3d 468 (2013) (same); Northwest Animal Rights Network v. State, 158 Wn.App. 237, 242 P.3d 891 (2010) (same).

In a private CPA suit, five conjunctive elements must be proven: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, *and* (5) causation." Columbia Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Associates, P.L.L.C., 168 Wn.2d 421, 442, 228 P.3d 1260 (2010) (citation omitted). The failure to establish all five elements is fatal to a CPA claim. Hangman Ridge Stables v.

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[4] The court is not required, however, to presume the "truth" of allegations that are demonstrably inaccurate as shown by (a) documents attached to or referred to in the complaint, or (b) matters that are properly subject of judicial notice on a Rule 12 motion.

Safeco Title Ins. Co., 105 Wn.2d 778, 793, 719 P.2d 531 (1986).

The CPA does not define "unfair" or "deceptive." But case law has developed and refined the meaning of these terms and implicit in the definition of "deceptive" under the CPA is the understanding that the practice misleads or misrepresents something of *material importance*. Stephens v. Omni Ins. Co., 138 Wn.App. 151, 168, 159 P.3d 10 (2007) (misrepresentation about nature of purported obligation).[5]

"Whether a particular act is 'unfair or deceptive' is a question of law." Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 47, 204 P.3d 885 (2009); see also Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997) (collecting cases); Rush v. Blackburn, 190 Wn.App. 945, 964-64, 361 P.3d 217 (2015) ("Whether undisputed conduct is unfair or deceptive is a question of law, not fact.") .

B. AS A MATTER OF LAW, CAVALRY'S NOTICE LETTER WAS NOT UNFAIR OR DECEPTIVE

1. The notice letter did not misrepresent either the nature or the details of Kelly's debt

The prototypical unfair or deceptive act under the CPA concerns a

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[5] See also Hiner v. Bridgestone/Firestone, Inc., 91 Wn.App. 722, 730, 959 P.2d 1158 (1998) ("Implicit in the definition of 'deceptive' is the understanding that the actor misrepresented something of *material importance*") (emphasis in original), rev'd on other grounds, 138 Wn.2d 248, 978 P.2d 505 (1999); Potter v. Wilbur–Ellis Co., 62 Wn.App. 318, 327, 814 P.2d 670 (1991) (failure to reveal a material fact known to the seller and that the seller in good faith is bound to disclose, may be classified an unfair or deceptive act due to its inherent capacity to deceive).

misrepresentation to a consumer about the source, quality, or price of a service or product.[6] Here, Cavalry's notice letter does not misrepresent the source, quality, or price of a service or product. Nor does Cavalry's notice letter misrepresent *any* aspect of Kelly's debt. (CP 186.)

Kelly's appeal briefing relies heavily on a misreading of Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 204 P.3d 885 (2009). (App. Br. at 10-11.) In an effort to draw an analogy to this case, Kelly argues that "[t]he consumers" in Panag "actually owed the debts[.]" (Id. at 10.) This factual representation is simply wrong and the error highlights the flaw of Kelly's argument.

A consideration of the facts of Panag and the legal analysis by both appellate courts that ruled on the case demonstrates why there is no unfair or deceptive act in this case.[7] An insurance company that had paid under

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[6] See, e.g., Nordstrom v. Tampourlos, 107 Wn.2d 735, 733 P.2d 208 (1987) (beauty salon using name "Nostrum" is wrongful appropriation of trade name and unfair and deceptive); Haner v. Quincy Farm Chems., Inc. 97 Wn.2d 753, 649 P.2d 828 (1982) (farmer purchased defective wheat seed); Williams v. Lifestyle Lift Holdings, Inc., 176 Wn.App. 62, 302 P.3d 523 (2013) (deceptive marketing of cosmetic surgery procedure); Robinson v. Avis Rent-A-Car Systems, Inc., 106 Wn.App. 104, 116, 22 P.3d 818 (2001) (affirming dismissal of CPA claim and noting that "quoting a car rental price that does not include a concession fee that is also charged would have the capacity to deceive the purchasing public, absent disclosure of that fee"); Eifler v. Shurgard Capital Management Corp., 71 Wn.App. 684, 861 P.2d 1071 (1993) (misleading advertising regarding safety and security of storage facility); Lidstrand v. Silvercrest Indus., 28 Wn.App. 359, 623 P.2d 710 (1981) (plaintiff purchased defective mobile home).

[7] In Panag, the Washington Supreme Court affirmed the Court of Appeals decision in Stephens v. Omni Ins. Co., 138 Wn.App. 151, 159 P.3d 10 (2007). The underlying factual record is presented in greater detail in Stephens.

an uninsured motorist policy hired a collection agency to seek reimbursement from the other parties in a covered accident. Stephens, 138 Wn.App. at 161. The collection agency sent out notices that listed an "amount due" and appeared to be collection notices for a debt certain, although a careful reading would have revealed that they were effectively making subrogation claims. Id. at 166–68.

The Court of Appeals found that "characterizing an unliquidated [tort] claim as an 'amount due' has the capacity to deceive." Stephens, 138 Wn.App. at 168. Thus, the deception concerned a misrepresentation as to the *nature* of the asserted obligation, *i.e.*, an unliquidated claim that might be contested was deceptively packaged as a specific amount actually due.[8] The court also expressly noted that this circumstance differed from "an unpaid consumer debt." Id.

The Washington Supreme Court affirmed Stephens in Panag, holding that the collection agency demands were deceptive because

> [a]n ordinary consumer would not understand the meaning of a 'subrogation claim' and likely would interpret the collection notices as representing a liquidated debt that the recipient is bound to pay rather than a potential tort claim that is subject to dispute.

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[8] "[W]hen a notice from a collection agency arrives with the message that it is a 'Formal Collection Notice' for an 'amount due', a recipient can reasonably expect to perceive it as notice of debt that must be paid." Stephens, 138 Wn.App. at 167. Such a notice "created an impression of a debt owed and sent to collection when in reality all the 'collector' had was a tort claim. This was deceptive." Id. at 169.

166 Wn.2d at 50.

In contrast with the notices in Stephens/Panag, Cavalry's notice letter does not misrepresent the nature of the asserted obligation. Cavalry's notice letter concerns an unpaid consumer debt; it accurately states the particulars of the debt in all respects; and Kelly concedes that he defaulted on this debt. (CP 3, ¶ 4.3.) As a matter of law, Cavalry's notice letter is not "unfair or deceptive" under the CPA.

2. RCW 4.08.080 is inapplicable

Kelly additionally argues that Cavalry's notice letter was "deceptive" because "if a collection notice misidentifies the owner of the account, no other facts contained in that collection notice are important." (App. Br. at 13.) For this argument, Kelly relies upon RCW 4.08.080, which addresses assigned obligations. (Id.)

RCW 4.08 generally concerns who are proper "parties to actions."[9] Thus, RCW 4.08.080 provides that an "assignee" of an obligation, where the assignment is in writing, may "by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors [.]"

Here, Cavalry was not the assignee of Kelly's defaulted debt (and

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[9] For example, RCW 4.08.030 provides that "[e]ither spouse or either domestic partner may sue on behalf of the community." Similarly, RCW 4.08.050 provides that "when an infant is a party he or she shall appear by guardian."

did not represent otherwise) and it never sued or maintained any action against Kelly. Accordingly, it is no surprise that neither of the cases cited by Kelly concerns a CPA claim. (App. Br. at 13.) Rather they involve construction of RCW 4.08.080 or its predecessor, where the disputed issue concerned the fact or validity of assignment.[10]

RCW 4.08.080 is inapplicable and irrelevant to this case.

C. CAVALRY DID NOT ASSERT A "BONA FIDE ERROR" DEFENSE UNDER THE FDCPA AND THE TRIAL COURT DID NOT GRANT CAVALRY'S MOTION ON THIS BASIS

Kelly argues that the trial court's use of the phrase "bonafide error" in its oral ruling on the motion for judgment constitutes legal error because it somehow refers to an affirmative defense to a federal statute that was never pled. (App. Br. at 14.) This argument is a straw man.

Kelly's complaint did *not* assert a FDCPA claim. (CP 1-14; see also App. Br. at 15.) Cavalry's answer did *not* assert an affirmative defense under the FDCPA. (CP 76; see also App. Br. at 15.) Cavalry's motion was *not* predicated on an affirmative defense under the FDCPA.

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[10] See Ingle v. Ingle, 183 Wash. 234, 237-38, 48 P.2d 576 (1935) (affirming judgment on debt assigned by "parol assignment" where assignee testified at trial concerning assignment); MCA Receivables Corp. v. Zion, 152 Wn.App. 625, 630, 218 P.3d 621 (2009) (reversing summary judgment where creditor "provided no direct or even indirect proof of any written assignment"); see also Zimmerman v. Kyte, 53 Wn.App. 11, 17-18, 765 P.2d 905 (1988) (citing Ingle and holding that an oral assignment satisfies the statute when the assignor takes the witness stand and testifies that the assignment occurred).

(CP 90-112.) And the trial court did *not* refer to or rely upon the FDCPA in granting Cavalry's motion. (RP 20:7-19.)

The FDCPA has no bearing on this case, except that: (i) the fact that Kelly did not allege an FDCPA claim suggests that Cavalry's collection activity is not actionable; and (ii) in opposing Cavalry's motion for judgment, Kelly himself referred to and relied, in significant part, upon the FDCPA. (See, e.g., CP 384:21; CP 386:4-7; CP 388:6-9; CP 391:17 – 392:12.) Kelly argued, without citation to any authority, that Cavalry's notice letter "would be considered" a violation of the FDCPA and, so, is a violation of the CPA. (CP 392:13-15.)

In reply, Cavalry noted that Kelly's Complaint did not allege a FDCPA claim and, in any event, there is no basis for a FDCPA claim on these facts. (CP 406:11-12.) Cavalry also observed that the FDCPA exempts from liability a debt collector's unintentional "bona fide error." (CP 406:13-14 (citing 15 U.S.C. § 1692k(c)). Thus, Cavalry argued, "even if the FDCPA were applicable here (*and it is not*), Cavalry's unintentional error would preclude liability." (CP 406:14-15, emphasis supplied.)

At the hearing on Cavalry's motion, Cavalry did not make

argument under the FDCPA.[11] Nor did Kelly.[12] And, in granting Cavalry's motion, the trial court did not cite or make reference to the FDCPA. (RP 20:7-19.)

In short, the trial court's use of the phrase "bonafide error" does not and cannot represent a ruling that Cavalry's motion for judgment was granted on the basis of an affirmative defense under a statute that was never pled or at issue.

D. CAVALRY DID NOT ASSERT A "GOOD FAITH" DEFENSE AND THE TRIAL COURT DID NOT GRANT CAVALRY'S MOTION ON THIS BASIS

Kelly's final argument is that the trial court's description of the error in Cavalry's notice letter as "unintentional" somehow refers to and erroneously relies upon a "good faith" defense to a CPA claim. (App. Br. at 17-18.)

As the case cited by Kelly makes clear (see App. Br. at 17), a

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[11] Cavalry's counsel noted that "[t]here is no allegation here that the substance of the communication by Cavalry or the nature of that communication is a violation of the Collection Agency Act or the FDCPA." (RP 9:5-8; see also RP 9:21-10:1.)

[12] Kelly's counsel did assert, in passing, that "the CPA is based on the Fair Debt Collection Practices Act, and it is that act that holds consumers to the least sophisticated consumer standard." (RP 15:1-4.) In fact, the CPA is modeled after Section 5 of the Federal Trade Commission Act. *See* 15 U.S.C. § 45(a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."). The CPA is intended to complement and be guided by the trade regulation decisions of the Federal Trade Commission and related federal court decisions. RCW 19.86.920.; see also Klem v. Washington Mut. Bank., 176 Wn.2d 771, 786-87, 295 P.3d 1179 (2013) (citing authority construing the FTC Act and 15 U.S.C. § 45(n)). CPA case law indicates that assessing whether a practice is "unfair" requires consideration of whether there is risk of "substantial injury to consumers *which is not reasonably avoidable by consumers themselves*." Rush v. Blackburn, 190 Wn.App. 945 963, 361 P.3d 217 (2015) (citation omitted; emphasis supplied.).

"good faith" defense in the context of a CPA claim concerns "acts 'performed in good faith *under an arguable interpretation of existing law*[.]'" Watkins v. Peterson Enterp., 57 F.Supp.2d 1102, 1110 (E.D.Wash. 1999) (citation omitted; emphasis supplied).

The record reflects that Cavalry never argued that the mistake in its notice letter was the result of an arguable interpretation of existing law—and it never asserted a "good faith" defense to the CPA. Unsurprisingly, the topic was not raised at oral argument on the motion. Kelly's argument is a groundless construct, but it does implicate an important issue.

It is, of course, black-letter law that a CPA claimant need not show that a defendant intended to deceive. Sing v. John L. Scott, Inc., 134 Wn.2d 24, 30, 948 P.2d 816 (1997) (quoting Hangman Ridge, 105 Wn.2d at 785). Cavalry cited this law in its moving papers and further addressed it in colloquy with the court at oral argument. (CP 101, 106; RP 10:2 – 11:3.)

But intent is an implicated and connected issue insofar as the conduct alleged to violate the CPA was itself unintentional—or, to put it another way, not willful. In this respect, consideration of an analogous statutory regime is illuminating.

Under Washington's wage statutes, a finding of "willfulness" triggers an employer's liability for exemplary damages. RCW 49.52.050, RCW 49.52.070. An employer's failure to pay wages is "willful" when the refusal to pay is "volitional." Morgan v. Kingen, 166 Wn.2d. 526, 534, 210 P.3d 995 (2009). "Willful means 'merely that the person knows what he is doing, intends to do it and is a free agent.'" Id., 166 Wn.2d at

534 (citation omitted).

In contrast, one of the defined circumstances that is *not* willful is where "the employer was careless or erred in failing to pay[.]" Morgan, 166 Wn.2d at 534. Simply put, a mistake is not volitional or willful. It is the product of carelessness or error and its occurrence does not subject one to penalties under a statutory scheme that is analogous to the CPA.[13] Here, Cavalry's notice letter contained a mistake, an unintentional error, when it misidentified the Cavalry affiliate that purchased Kelly's debt. (CP 35:6 – 37:22; CP 43:15-20.)

Since the CPA's enactment in 1961, there have been more than fifty years of related case law. And yet Cavalry is unaware of any Washington authority (or any federal authority) holding that a non-volitional act or mistake violates the CPA. Cavalry raised this argument in its moving papers below. (CP 106:6-8.) In response, Kelly's opposition cited five (5) cases that involved a CPA claim. (CP 381-397.) None is factually apposite—and none of these cases concern circumstances involving unintentional mistakes.[14]

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[13] Compare Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 157-58, 961 P.2d 371 (1998) (noting that the legislature "has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure the payment of wages;" the statute is "protective," and should be "liberally construed to advance the Legislature's intent to protect employee wages and assure payment.") with RCW 19.86.920 (The purpose of the CPA is "to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition" and "[t]o this end this act shall be liberally construed that its beneficial purposes may be served.").

[14] See Klem v. Wash. Mut. Bank, 176 Wn.2d 771,797, 295 P.3d 1179 (2013) (regular business practice of falsifying notarizations); Panag v. Farmers Ins. Co., 166 Wn.2d 27, 57, 204 P.3d 885 (2009) (collection notice listing an "amount due"

VI. CONCLUSION

Based on an undisputed factual record, the trial court correctly ruled that Cavalry's January 9, 2012 notice letter was not an "unfair or deceptive act or practice" as a matter of law. The trial court's ruling should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of March 2016.

SAVITT BRUCE & WILLEY LLP

By: */s/ Stephen C. Willey*
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Attorneys for Respondent
Cavalry Portfolio Services, LLC

misrepresented an unliquidated tort claim as being a sum certain owed); Hangman Ridge Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 793, 719 P.2d 531 (1986) (reversing judgment for plaintiff; CPA claim alleged against escrow agent for wrongful failure to warn of tax consequences); Lightfoot v. McDonald, 86 Wn.2d 331, 333, 544 P.2d 88 (1976) (affirming dismissal of malpractice and CPA claims against attorney); Hockley v. Hargitt, 82 Wn.2d 337, 351, 510 P.2d 1123 (1973) (CPA permits an individual to seek an injunction that would protect his own interests and the public interest; context concerned misrepresentations to buyers regarding sales of divorce-provider franchise).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a copy of the attached document – RESPONDENT'S BRIEF – to be served upon the attorneys of record listed below by U.S. Mail, postage prepaid:

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I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 22nd day of March 2016, at Seattle, Washington.

Leslie Castello

SAVITT BRUCE AND WILLEY LLP

March 22, 2016 - 10:07 AM

Transmittal Letter

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